



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL APPEAL NO.13 OF 2019

VITALIS MAKOKHA WAMBIA.....PLAINTIFF/APPELLANT

VERUS

CO-OPERATIVE BANK OF KENYA.....DEFENDANT/RESPONDENT

R U L I N G

[1] The genesis of this matter is traceable to statement of claim (**plaint**) filed by the applicant **Vitalis Makokha Wambia** on the 24th April 2017 against the respondent, **The Co-operative Bank of Kenya Ltd**, in the Magistrates Court vide Busia CMCC No.110 of 2017, wherein the applicant prayed for a declaration that the respondent/defendant clear him from it's system as a defaulter and pay him general damages as may be assessed by the court. The cause of action apparently arose from loan facilities extended to the applicant/plaintiff by the defendant bank which contended in its defence that the applicant defaulted in the repayment of the loan and was referred to the Metropol Credit Reference Bureau (**CRB**) as his loan account was still in arrears.

[2] After a full hearing, the lower court rendered its judgment on 28th May 2019, dismissing the applicant's case with costs to the defendant.

The applicant was aggrieved, he preferred an appeal to this court but, it was heard and dismissed with costs. His next port of call was the Court of Appeal. Instead, he returned to this court vide the Notice of motion dated 6th January 2021, essentially seeking stay of execution of the judgement rendered by this court on 30th September 2020.

The application is basically anchored on the provisions of **Order 42 Rule (5)** and **(6)** of the **Civil Procedure Rules** and on the grounds contained in the Notice of motion as fortified by applicant's averments contained in the supporting affidavit dated 6th January 2021.

The respondent opposed the application on the basis of its grounds of opposition dated and filed herein on 5th February 2020 and 5th February 2021 respectively.

[3] Written submissions were filed by the applicant on 18th November 2021 but were apparently not served upon the respondent for their response.

Be that as it may, this court has considered the application on the basis of the supporting grounds and those in opposition thereto and in the light of the applicant's submissions.

The issues arising for determination are **firstly**, whether the application is competent and proper before the court and **secondly**, if so, whether the applicant has provided and established satisfactory grounds for exercise of this court's discretion in his favour.

With regard to the first issue, the exhibits marked "**Wambia 3**" and "**Wambia 4**" annexed to the applicant's replying affidavit are a confirmation that an appeal against the decision of this court rendered on 30th September 2020 was filed at the Court of Appeal in Kisumu. Prayer 2 of the application alludes to an order of stay of execution of the judgement pending hearing and determination of this application interparties and not pending hearing and determination of the appeal filed at the Court of Appeal. Prayer 3, alludes to conservatory orders pending hearing and determination of the appeal.

It is not therefore clear what the applicant is actually seeking at this stage. The manner of drafting of this application leaves a lot to be desired. However, the applicant was acting in person and may not have received proper guidelines on presentation of such application.

[4] Nonetheless, **Order 42 Rules (5)** and **(6)** of the **Civil Procedure Rules** was invoked as the primary enabling provision of the Law and to guard against procedural and/or technical errors, **Article 159 (2)** of the Constitution was invoked. It would therefore follow that the

applicant is actually seeking stay of execution orders pending the hearing and determination of the appeal at the Court of Appeal. So, in order to do justice and determine the application on its merits without undue regard to procedural technicalities, this court would find that the application is competent and proper before it.

With regard to the second issue for determination, **Order 42** of the **Civil Procedure Rules** generally provides for appeals. **Rule 6 of Order 42** is the most applicable in the present circumstances.

[5] **Rule 6(1)** provides that:-

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree order, and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made, to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

Rule 6 (2) provides that:-

“No order for stay of execution shall be made under subrule (1) unless:-

(a) the court is satisfied that substantial loss may result to the applicant, unless the order is made and that the application has been made without unreasonable delay and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

[6] Herein, the grounds in support of the application as fortified by the facts and averments contained in the applicants supporting affidavit do not demonstrate whatsoever that the applicant will suffer substantial loss unless a stay order is granted. It is not enough for him to merely state that he shall suffer irreparable damage without offering credible and sufficient evidence to prove the fact.

Secondly, the applicant has not even offered to provide any security for the due performance of the decree herein.

In his submissions, it is apparent that the applicant seeks a stay order on the basis of arguability of his appeal and probability of its success. However, these are not grounds for stay of execution in terms of **Order 42 (6)** of the **Civil Procedure Rules**.

[7] Besides, the fact that the applicant has made tremendous efforts towards the expeditious disposal of the appeal, while commendable, is not a ground for grant of a stay order. Ultimately, this court must find that the applicant has failed to provide and establish satisfactory grounds for exercise of discretion in his favour and issue a stay order against the respondent.

On the periphery and without going into details, the application begs the question whether or not there is really anything to stay considering that the applicant's case was dismissed by both the lower court and this High Court.

Is the decree obtained by the respondent against the appellant capable of being stayed???

In sum, the present application is lacking on merit and is hereby dismissed with costs to the respondent.

J.R KARANJAH

J U D G E

[Read & signed this 30TH day of NOVEMBER 2021]